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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1997

HON. THOMAS R. PHILLIPS, et al.,  
*Petitioners,*

v.

WASHINGTON LEGAL FOUNDATION, et al.,  
*Respondents,*

On Writ of Certiorari  
to the United States Court of Appeals  
for the Fifth Circuit

BRIEF OF *AMICUS CURIAE*  
NATIONAL RIGHT TO WORK LEGAL  
DEFENSE FOUNDATION, INC.  
IN SUPPORT OF RESPONDENTS

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INTRODUCTION

Pursuant to Rule 37.3 of the Rules of this Court, the National Right to Work Legal Defense Foundation, Inc. ("Foundation") files this brief *amicus curiae* in support of Respondents. All parties have consented to the filing of this



brief, and their letters of consent have been filed with the Court.<sup>1</sup>

### INTEREST OF THE *AMICUS CURIAE*

The National Right to Work Legal Defense Foundation is a nonprofit, charitable organization that provides free legal assistance to individual employees who, as a consequence of compulsory unionism, have suffered violations of their right to work; their freedoms of association, speech, and religion; their rights to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and of the several states.

The Foundation has supported this Court's major cases involving the rights of employees to refrain from joining or supporting labor organizations as a condition of employment. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers of America v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Minnesota State Bd. v. Knight*, 465 U.S. 271 (1984); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); and *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). In hundreds of other cases throughout the country, the Foundation is now aiding employees who seek to limit their forced association with unions and their financial payments to those unions.

The issue before this Court is whether the taking of interest earned on Interest on Lawyer Trust Accounts ("IOLTA") constitutes a taking of Respondents' property. In addition to Fifth Amendment issues, the case raises important compelled speech issues. At least one *amici* supporting

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<sup>1</sup> Pursuant to Rule 37.6 of the Rules of this Court, this brief was not written in whole or part by a counsel for a party to the litigation. No monetary contribution to the preparation or submission of this brief was made by any person or entity other than the *amicus curiae*.

Petitioners, The American Association of Retired Persons and the Legal Counsel for the Elderly, has urged this Court to consider the First Amendment issues and rule that Petitioners have no First Amendment rights infringed by the IOLTA programs. The National Right to Work Legal Defense Foundation argues that the First Amendment issues stand independent from the Fifth Amendment issues and urges this Court to refrain from deciding the First Amendment issues in this case.

### SUMMARY OF THE ARGUMENT

The question before this Court is whether Petitioners have any property interest in the funds deposited into the IOLTA. However, this case also raises important First Amendment issues.

If, *arguendo*, this Court decides that Respondents have not had their Fifth Amendment rights abridged by the taking of the interest generated in the IOLTA, Respondents still have sufficient property rights in the funds held in the IOLTA to maintain a First Amendment claim. That is because the money generated by funds in the IOLTA is often used for political and ideological purposes. That type of activity is at the core of the First Amendment. Furthermore, the expressive nature of the litigation engaged in by organizations receiving IOLTA funds implicates First Amendment rights.

The fact that interest generated by the money of each involuntary participant in IOLTA programs might be small, or the fact that the use of the money is temporary is irrelevant when First Amendment rights are implicated. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 304-06 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435, 444 (1984).

Since Respondents are forced to finance IOLTA recipient organizations, there is an impact on Respondents' First Amendment rights of freedom of speech and association. Accordingly, traditional First Amendment analysis must be

applied to this case to determine if the infringement can withstand constitutional scrutiny.

Since the First Amendment issues have not been briefed, *amicus* National Right to Work Legal Defense Foundation urges the Court to refrain from deciding important First Amendment issues raised by this case.

### ARGUMENT

#### I. THIS CASE INVOLVES BOTH FIRST AND FIFTH AMENDMENT ISSUES BUT SHOULD BE DECIDED SOLELY ON THE FIFTH AMENDMENT QUESTION.

In the district court, Respondents made two constitutional claims challenging the IOLTA programs. First, they argued that Petitioners have infringed upon their Fifth Amendment rights by taking their property in violation of the takings clause. Secondly, they argued that by forcing Respondents to choose between using the legal system and participating in the IOLTA programs, thus providing financial support to causes with which they disagree, Petitioners violated Respondents' First Amendment rights.

The district court granted summary judgment to Petitioners on the theory that individuals who have their money placed into the IOLTA have no property rights in the interest generated from said funds. The Fifth Circuit reversed, holding that interest earned on the IOLTA is the property of the IOLTA depositor. It remanded the case to the district court for a determination whether the property was taken against the will of the property owner.

The Fifth Circuit found that individuals who have funds placed into the IOLTA do have a property interest in those funds. If the Fifth Circuit's ruling is affirmed, then Respondents will have the opportunity, on remand in the district court, to demonstrate that the taking also infringes upon their

First Amendment rights. If the Fifth Circuit's ruling is not affirmed, then Respondents should have the opportunity, for the reasons discussed below, to establish that the IOLTA programs violate their First Amendment rights.

#### II. THE COURT SHOULD REJECT THE SUGGESTION OF ONE OF THE *AMICI* SUPPORTING PETITIONERS THAT THE COURT SHOULD RULE AGAINST RESPONDENTS' FIRST AMENDMENT CLAIMS.

The Court limited the issue to be decided in this case to the question whether Respondents have a property interest in the interest earned on funds placed in IOLTA programs. However, the American Association of Retired Persons and the Legal Counsel for the Elderly filed an *amici curiae* brief in support of Petitioners urging this Court to consider and reject the First Amendment claims of Respondents. For the reason discussed below, this Court should reject the position of the *amici* American Association of Retired Persons and the Legal Counsel for the Elderly.

The Court may decide that Respondents do not have sufficient property interest to establish a claim under the Fifth Amendment. In doing so, the Court might, however, find that Respondents have some property interest in the beneficial use of the funds placed into the IOLTA, or some property interest in the funds generated by those accounts. While those rights may be insufficient under the facts of this case to make a claim under the Fifth Amendment, that does not preclude Respondents from making a claim under the First Amendment. Therefore, even if, *arguendo*, this Court rules that there is no taking of property in violation of Respondents' Fifth Amendment rights, the Court should not reject Respondents' First Amendment claims. The Respondents' First Amendment challenge to the IOLTA programs stands independent of the Fifth Amendment claim.



**III. THIS CASE INVOLVES SIGNIFICANT FIRST AMENDMENT ISSUES THAT SHOULD NOT BE TAKEN UP UNTIL FURTHER BRIEFING.**

The funds generated by the IOLTA programs in general, and the Texas IOLTA program in particular, are often used for ideological purposes. The funds generated in the IOLTA in Texas are initially transferred to the Texas Equal Access Justice Foundation ("TEAJF"). The TEAJF then distributes the funds to various private organizations that provide legal services. Funds generated by the IOLTA are used by the various recipient organizations in Texas to provide legal aid to refugees and to assist death row inmates challenging their death sentences. *Washington Legal Foundation v. Texas Equal Access*, 94 F.3d 996, 999 (1996). Each of those activities has an ideological component.

Money generated by funds in the IOLTA and turned over to private organizations is often used for political and ideological purposes. See Rounds, *Social Investing, IOLTA, and The Law of Trusts: The Settlor's Case Against the Political Use of Charitable and Client Funds*, 22 Loy. U. Chi. L.J. 163, 178-81 (1990).

Furthermore, legal service organizations are frequent recipients of IOLTA funds. The use of IOLTA funds by legal service organizations has been a heated political issue. See *In re The Matter of Public Law No. 1541990*, 561 N.E.2d 791, 795 (Ind. 1990) (Pivarnick, concurring) (discussing political and ideological activities engaged in by legal service organizations); 38 Cong. Rec. H65, at 3129-34 (daily ed. May 12, 1992) (debate and vote on whether Congress should prohibit Legal Services Corporation grantees from using IOLTA funds on venous political and ideological activities).

Activities engaged in by the recipients of IOLTA generated funds have significant communicative content because discussion of governmental affairs is at the core of First Amendment freedoms. *Lehnert*, 500 U.S. at 522; *Buckley v.*

*Valeo*, 424 U.S. at 1, 14 (1976); *Roth v. United States*, 354 U.S. 476, 484 (1957).

In addition to the impact such ideological activities have upon First Amendment rights of involuntary participants of IOLTA programs, the funding of litigation itself has First Amendment implications. In the context of a case dealing with compulsory union fees, this Court has held that litigation is not chargeable to objecting non-member fee payors unless it is directly related to collective bargaining or contract administration for the non-member's bargaining unit. *Ellis*, 466 U.S. at 453.

As this Court stated in another case involving the use of compulsory union dues:

We long have recognized the important political and expressive nature of litigation. See *e.g. NAACP v. Button*, 371 U.S. 415, 431, 83 S.Ct. 328, 337, 9 L.Ed.2d 405 (1963) (recognizing that for certain groups "association for litigation may be the most effective form of political association"). Moreover, union litigation may cover a diverse range of areas from bankruptcy proceedings to employment discrimination. See *Ellis*, 466 U.S., at 453, 104 S.Ct., at 1894. When unrelated to an objecting employee's unit, such activities are not germane to the union's duties as exclusive bargaining representative. Just as the Court in *Ellis* determined that the RLA, as informed by the First Amendment, prohibits the use of dissenters' fees for extraunit litigation, *ibid.*, we hold that the Amendment proscribes such assessments in the public sector.

*Lehnert*, 500 U.S. at 528.

So also in this case, the expressive nature of the litigation, especially political and ideological litigation engaged in by

organizations that receive IOLTA funds, implicates the First Amendment rights of the Petitioners.

The amount of money that the involuntary user of an IOLTA program has a property interest in is irrelevant. As this Court has held:

The amount at stake for each individual dissenter does not diminish this concern. For, whatever the amount, the quality of respondents' interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear.

*Hudson*, 475 U.S. at 305.

As James Madison wrote, "Who does not see...(t)hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" 2 *The Writings of James Madison* 186 (Hunt ed. 1901).

Similarly, the fact that the use of the money that generates IOLTA funds is only temporary is not relevant. This Court has condemned on several occasions even the temporary use of compulsory union fees and compulsory Bar dues for political and ideological purposes. *Hudson*, 475 U.S. at 304-06; *Ellis*, 466 U.S. at 444.

Even if, *arguendo*, the taking of the interest earned on the funds held in the IOLTA does not amount to an unconstitutional taking, the involuntary users of the IOLTA may still have an objection that the money held in the trust account is used to generate interest for causes with which they disagree. The participants in IOLTA programs are forced to choose between refraining from exercising a civil right—the use of the courts—or supporting political and ideological causes with which they disagree.

When the state forces an individual to financially support a private organization (such as the IOLTA recipients) as a condition of exercising a legal right, it is "a significant impingement on First Amendment rights." *Ellis*, 466 U.S. at 455. Accordingly, traditional First Amendment analysis must be applied to this case to determine if the infringement can withstand constitutional scrutiny.

If, *arguendo*, the Court finds that Respondents have some property interest in the funds deposited into the IOLTA but that the property interest is insufficient to make the taking of the interest earned on that property an unconstitutional taking, then the Court should refrain from making any pronouncements concerning Respondents' First Amendment claims.

## CONCLUSION

If this Court does not affirm the Fifth Circuit's holding that Respondents have a property interest in the funds held in the IOLTA, then it should refrain from deciding the important First Amendment issues raised by this case until the issue is squarely before this Court.

Respectfully submitted,

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